United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2594

To be argued by
SHEILA GINSBERG

B pd's.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

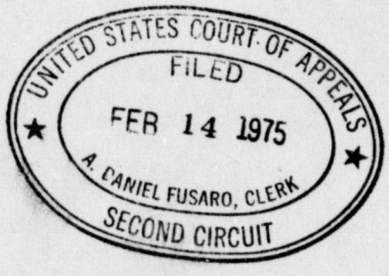
JACQUELINE DOZIER,

Appellant.

Docket No. 74-2594

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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UNITED STATES OF AMERICA, Appellee, -against- JACQUELINE DOZIER, Appellant.	Docket No. 74-2594

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
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FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether it was reversible error for the Judge to instruct the jury that a finding of ignorance caused by a "conscious purpose to avoid" knowledge was tantamount to the requisite finding of knowledge.

2. Whether in his charge the Judge committed reversible error by (1) instructing that appellant was an incredible witness; and (2) marshalling the evidence so as to telescope to the jury his belief in appellant's guilt.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Orrin G. Judd) entered on December 6, 1974, after a trial before a jury, convicting appellant Jacqueline Dozier of one count of aiding and abetting the possession of cocaine with intent to distribute (21 U.S.C. §841(a)(1)), and sentencing her pursuant to 18 U.S.C. §5010(e), the Youth Corrections Act, to a ninety-day study and observation.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant was charged* with one count of aiding and abetting the possession of cocaine with intent to distribute. The Government's direct case relied on the testimony of Michael Bergin (3-61*) and Joseph Miller (62-109), both officers of the New York City Police Department. Miller had recently been

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*The indictment is "B" to appellant's separate appendix.

**Numerals in parentheses refer to pages of the transcript of the trial.

suspended by the Department for thirty days without pay in response to an allegation that he had stolen five dollars from a person he had placed under arrest* (73-75).

Both Miller and Bergin agreed that all their negotiations for the purchase of cocaine were made with one Mary Lou Dantzler** and that neither officer had ever seen or talked with appellant before the night of December 12, 1973 (23,100). In the course of their negotiations the officers, acting in their capacity as undercover men, had been to Dantzler's apartment on the night of December 11, 1973. Dantzler, alone, talked with them and told them to contact her later to arrange the sale of one-eighth of a kilogram of cocaine (25,98). In subsequent telephone calls, it was arranged that Bergin and Miller would meet Dantzler outside her apartment at 1102 President Street in Brooklyn on the night of December 12 (97). The officers arrived at approximately 10:00 p.m. to find Dantzler and appellant standing outside (8).

According to Bergin, who was driving, he double-parked the agents' car. Dantzler, with appellant in tow, walked into the street between two parked cars and to the window of the officers' car (10). He estimated that appellant stood approximately three feet away while he and Dantzler, speaking

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*This matter was presented to a New York State grand jury, which dismissed the complaint.

**Dantzler, who was indicted with appellant, pleaded guilty just prior to trial.

in "normal" voices, discussed that the "package" was ready, but that only one-half the amount asked for was available (11,29).

In contrast, Miller asserted that Bergin did not double-park the car, but instead pulled up to the curb (99). While Miller did see Dantzler come up to the window, he could not see where appellant was standing and, although he was sitting next to Bergin, could not hear everything that was said (98).

After assuring Bergin that the package was there, Dantzler told him that the sale would not take place in the car and that appellant would take them to a designated location (10-11). At Dantzler's direction and after brief introduction, appellant then got into the back seat of the car and directed Miller a short distance to the Grant Cameo movie theater on Eastern Parkway (12). Bergin and Miller did not agree on the substance of the conversation which occurred in the car, Bergin asserting that there was no talk about the deal (13), and Miller maintaining that they discussed why they had to "do the deal" in the movie theater rather than in the car. According to Miller, it was in the car that appellant assured them that Dantzler was "okay" and that there would be no "rip-off" (101-103).

When the three arrived at the Eastern Parkway destination Bergin, according to his testimony, locked the purchase money in the trunk of the car (13). The three then entered the movie theater. Bergin said they entered to the left (39); Miller, on the other hand, said they entered to the right (85). They stood at the back of the orchestra section of the theater wait-

ing for Dantzler (13). During this time Bergin asked appellant* if Dantzler would show up, and appellant responded that there was no cause for concern since Dantzler "does straight business" (14).

Shortly thereafter, Dantzler arrived. She said she had the package, although it was nowhere visible (15). Appellant accompanied Dantzler, Bergin, and Miller back to the lobby, where Dantzler and Bergin entered the men's room while appellant waited at the door (15). Inside the men's room, Bergin examined the package** and then emerged to tell Miller that the package was there and he was to go to the car to get the money (17). Miller left. Moments later he returned with the surveillance officers, who arrested Dantzler and appellant (19). Also arrested was LeRoy Dantzler, Mary Lou's brother, who, preceding Miller into the theater, shouted a warning that the police were coming (20,49).

Appellant testified on her own behalf (113-168). She was eighteen years old at the time of the trial and had no prior criminal record. A student at Medgar Evers College and in the Manpower Adult Training Program, she lived at home with her mother, an employee of the Manhattan District Attorney's office, and her two younger brothers (115).

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*Miller said it was he who asked the question.

**The Government introduced a stipulation in which it was agreed that if the Government chemist were called, he would testify that the package seized contained 67.4 grams of cocaine hydrochloride (110-110a).

Appellant explained that she knew Mary Lou Dantzler as the sister of a good friend with whom appellant had gone to school (116). On the evening of December 12, 1973, appellant testified, she went to Mary Lou's house intending to help her decorate a Christmas tree* which she had seen Dantzler purchase a few days earlier (117). While she was there, the two women talked of going to see a particular singing group which Dantzler was interested in seeing. There was absolutely no talk of cocaine or drug sales, appellant testified (118-119). What Dantzler did say was that she was expecting two friends to arrive and that she wanted appellant to go with them to the Cameo movie theatre (120). Appellant agreed, and shortly thereafter the two went downstairs to wait for Mary Lou's friends. About twenty minutes later a car arrived and double-parked in front of the apartment building (121-122). Dantzler walked over to the car, leaving appellant on the sidewalk (123). After a conversation with the driver, Dantzler motioned appellant to join them. She introduced appellant, saying, "Jackie, this is Mike [Bergin] and Russell [Miller]," and she told them that appellant would take them to the movie (124). Appellant got into the car and directed them to the theater. During the ride she was asked only where Mary Lou had gone, and she responded that she didn't know (125).

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*She conceded that she did not tell her mother where she was going, nor did she follow her mother's orders that she be home by 10:00 p.m. (142).

After arriving at the theater, appellant and the two police officers waited for Mary Lou to arrive. When she did, Bergin and Miller went with her to the men's room, and appellant followed them to the lobby. She was standing there when she was subsequently arrested. The only time that evening she saw cocaine* or heard discussion about a cocaine sale was after she had been taken to the police precinct station and one of the officers showed her the contents of the package (126-36).

In rebuttal, Mary Lou Dantzler, who had pleaded guilty and was awaiting sentence, testified for the Government (169-203). She claimed that on the night of December 12 when appellant arrived uninvited at her apartment, she told appellant about the imminent cocaine transaction and asked appellant to take the two prospective purchasers to the movie theater (171). On cross-examination, Dantzler, who had a prior history of heroin addiction, asserted that she did not expect that the trial judge who would sentence her would be apprised of her cooperation** (203). She also denied ever telling appellant's

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*Appellant admitted having seen cocaine before when she studied nursing in the Job Corps (159, 211).

**Despite her brother's full confession as to his involvement in this transaction, Dantzler maintained his innocence (95).

mother that appellant was innocent,* and while she admitted her prior statement exculpating appellant to defense counsel, she now characterized that statement as "untrue" (201).

In his charge to the jury,** the Judge instructed on the element of knowledge as follows:

> I refer to the word knowingly, knowledge can be proved by a defendant's conduct and by all facts and circumstances surrounding the case. No person can intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate; and so, knowledge can be established by direct or circumstantial evidence just as any other facts in the case, and you can consider the peculiarity if you consider as such of going to a theater with a couple of strange men without the one who introduced him to you at 10:00 o'clock at night, in the middle of the second show and see whether that is a circumstance that implies knowledge that there was a cocaine transaction to take place in an area where Miss Docier, Sr. said cocaine was all over the neighborhood, or whether it was just an adventurous girl who thought here was a chance to go out, she had an older friend and she would have an interesting time. If you find from all the evidence beyond a reasonable doubt either that the defendant knew that she was helping in a cocaine transaction, or that she had a conscious purpose to avoid finding out the identity of the substance so as to close*** her eyes of the facts, you could find sufficient evidence to find her guilty beyond a reasonable doubt.
>
> (9-10****).

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*In surrebuttal, appellant's mother testified, as did appellant, that Dantzler had assured them both that appellant was not involved and that it was Dantzler who was in trouble (205,213).

**The entire charge to the jury is annexed as "C" to appellant's separate appendix.

***This word incorrectly appears in the transcript as "clear". A corrected page of the transcript will be docketed with the record on appeal.

****Numerical references to the charge are to pages in the transcript dated September 24, 1974.

On the criteria for evaluating witness credibility, the Judge singled out appellant, and charged as follows:

> Now, on the evaluation of the evidence. I said at the beginning that a defendant doesn't have to testify and you can't infer anything if she does not. The law does permit defendants to testify on their own behalf if they wish, and you are to determine how far the defendant's own testimony is credible. You could consider deep personal interest that every defendant has in the result of a case in weighing the testimony. To some extent only Jacqueline Docier could defend herself against the contention that she knew what was going on and that she had gone along in order to help find a safe place to distribute this contraband.
>
> A defendant who would help in selling cocaine would probably lie to protect herself but she submitted herself to cross-examination, and a defendant who testifies may well be telling the truth.
>
> (10-11).

After deliberating, the jury returned with the following question:

> If the defendant went to the theater thinking there was an illegal transaction but had no idea it was cocaine, does this make a difference?
>
> (19).

Over defense counsel's objection,* the Judge gave this further instruction:

> .... I would say it does make a difference to the extent there are different penalties for different crimes, so I don't think aiding and abetting in something less than drugs

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*Defense counsel argued that the answer required was simply "yes" (20).

> could justify a conviction here, but cocaine and heroin are in the same category. If she believed it was drugs but wasn't sure what kind, that wouldn't affect her guilt of aiding and abetting; and what I said about knowledge should be considered. Knowledge may be proved by a defendant's conduct and by all of the facts and circumstances surrounding the case. No person can intentionally oppose knowledge by closing her eyes to facts that whould prompt her to investigate. So in order to convict you have to find either that she knew that some kind of narcotic drug was involved not necessarily by the time she went to the theater but by the time, if you believe the Government agent's testimony, that she reassured the Government agent that Mary Lou would be coming, she must have either known that either there was a narcotic drug involved or had knowledge of sufficient facts that she was just trying* to prevent herself from having knowledge, deliberately closing her eyes. I hope that will help you decide it . . . .
>
> (20-21).

Twice more the jury returned, once to say that they could not reach a verdict, and subsequently to reveal that one juror would discuss neither the facts nor the law as it applied to the case because his belief in God precluded making a decision regarding anyone's guilt (24). After conceding that this impasse was due to his failure to ask the proper questions of the jurors on voir dire, the Judge instructed the jury that they were all pledged to an oath which created a duty simply to vote "one way or the other" (26). The jury resumed deliberations and returned a verdict of guilty shortly thereafter (28).

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* These words appear incorrectly in the transcript as "justifying". A corrected page will be docketed with the record on appeal.

POINT I

IT WAS REVERSIBLE ERROR FOR THE JUDGE TO INSTRUCT THE JURY THAT A FINDING OF IGNORANCE CAUSED BY A "CONSCIOUS PURPOSE TO AVOID" KNOWLEDGE WAS TANTAMOUNT TO THE REQUISITE FINDING OF KNOWLEDGE.

The jury interrupted its deliberations to ask the Court whether it would affect their verdict if appellant went to the theater aware of an illegal transaction but nonetheless ignorant of the fact that it involved cocaine. This question reveals that the jury had focused on the key issue in the case - whether appellant had the knowledge requisite to subject her to liability pursuant to 21 U.S.C. §841(a)(1)*. The statue specifically establishes that in order for the possession to be criminal it must be done "knowingly," which translates into a requirement of knowledge that the item possessed is a "controlled substance" (United States v. Joly, 493 F.2d 672 (2d Cir. 1974)).

Over defense counsel's objection - counsel argued that the answer to the jury's question was simply "yes" - the judge gave

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*21 U.S.C. §841(a) provides in petinent part:
Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance . . .

a supplemental instruction reiterating the portions of the initial charge* on knowledge and conscious avoidance of knowledge:

> . . . I would say it does make a difference to the extent there are different penalties for different crimes, so I don't think aiding and abetting in something less than drugs could justify a conviction here, but cocaine and heroin are in the same catagory. If she believed it was drugs but wasn't sure what kind, that would affect her guilt of aiding and abetting . . . No person can intentionally oppose knowledge by closing her eyes to facts that should prompt her to investigate. So in order to convict you have to find either that she knew that some kind of narcotic drug was involved . . . or had knowledge of sufficient facts that she was just trying to prevent herself from having knowledge, deliberately closing her eyes.

The clear but erroneous import of the instruction was to create as an alternative to the element of knowledge the failure to fulfill a duty to investigate which is triggered by suspicious circumstances. However, no such duty exists

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*The initial charge provided:

> . . . No person can intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate.
>
> * * *
>
> If you find from all the evidence beyond a reasonable doubt either that the defendant knew that she was helping in a cocaine transaction, or that she had a conscious purpose to avoid finding out the identity of the substance so as to clear her eyes to the facts, you could find sufficient evidence to find her guilty beyond a reasonable doubt.

here. Unlike certain specialized areas of the law (i.e., Securities law, United States v. Squires, 440 F.2d 859, 863 (2d Cir. 1971)) where the knowledge requirement includes the duty to investigate) §841(a)(1) requires that appellant actually know of the substance involved.

Nor, on the facts of this case will a "conscious avoidance of knowledge" of the contents of the package Dantzler had in his sole possession substitute for the requirement that appellant have actual knowledge that cocaine was sealed therein.

While this Court on occassion has approved the "conscious avoidance of knowledge" charge, it has never done so in this factual context. Here, the record shows that appellant never had possession of the package containing the cocaine; in fact, on the testimony of both Bergin and Miller appellant never even saw the package. Moreover, in none of her conversations with the police officers were the words "cocaine" or "drugs" ever mentioned.

This case is therefore wholly unlike United States v. Oliverez-Vega, 495 F.2d 827, 830 (2d Cir. 1974) and United States v. Joly, supra, 493 F.2d at 674-6 (2d Cir. 1974) where this Court's opinions were founded upon the strong inference of knowledge from possession. Such rationale cannot control here, for without possession there is no valid basis for drawing the inference.

Moreover, as the jury clearly recognized, appellant's awareness of some illegality, as indicated by her assurance that Dantzler does "straight business," did not establish appellant's knowledge of the specific character of the transaction. The variety in the kinds of illegal sales possible is virtually endless: Dantzler may have been dealing in stolen goods, counterfeit bills or illegally obtained credit cards. Consequently, because of the multiple alternatives, a conscious purpose to avoid finding out exactly what Dantzler was about will not adquately establish the specific knowledge required.

At minimum, knowledge of an essential fact means that

> . . . a person is aware of a high probability of its existance unless he actually believes that it does not exist.

Leary v. United States, 396 U.S. 6, 49 no. 3 (1909); Turner v. United States, 396 U.S. 398, 416 n. 29 (1970); Model Penal Code §2.02(7) (Proposed Official Draft, 1962).

While in some circumstances "a conscious avoidance of knowledge" may constitute an awareness of a high probability of the existence of the critical fact, so as to justify the inference of knowledge of it (Turner v. United States, supra, 396 U.S. at 416 and n.29; Leary v. United States, supra, 395 U.S. at 46, n.93; United States v. Joly, supra, 493 F.2d 672 at 676; United States v. Jacobs, 475 F.2d 270, 287-88 (2d Cir. 1973); United States v. Sarantos, 455

F.2d 877, 880-82 (2d Cir. 1972); United States v. Squires, 440 F.2d 859 at 863; United States v. Matalon, 425 F.2d 70 (2d Cir.), cert. denied, 400 U.S. 841 (1970)), that is not so in this case.

In each of those cases cited the deliberate avoidance of knowledge of the critical fact occurred in a situation where the defendant was faced with a two-pronged alternative--knowledge that the goods were imported or domestic (Turner v. United States, supra; Leary v. United States, supra; United States v. Matalon, supra); knowledge that the goods were stolen or not (United States v. Jacobs, supra); knowledge that the statements were true or false (United States v. Squires, supra)-- so that a conscious choice to avoid literal recognition of the essential fact nonetheless establishes the requisite threshold of "awareness of the high probability" that the critical fact exists.* Turner v. United States, supra, 396 U.S. at 416 and n. 29; Leary v. United States, supra, 395 U.S. at 46, n.93; American Law Institute, Model Penal Code, §2.02(7) (Proposed Official Draft 1962).

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*The charge given in United States v. Joly, supra, 393 F.2d, by its very terms restricted the jury's analysis to this two-pronged alternative. There, the Court directed:

> If you find from all the evidence beyond a reasonable doubt that the defendant believed that he had cocaine and deliberately and consciously tried to avoid learn-

(Continued on next page)

In this case, because the alternatives are myriad and there is no basis for any inference of knowledge (such as may arise from possession) the purposeful avoidance of knowledge fails to create the essential awareness. Therefore, the instruction relieved the jury of the duty of finding actual knowledge and invited a conviction upon a finding of actual ignorance. The conviction must be reversed.

Continued from last page *
ing that there was cocaine in the package he was carrying in order to be able to say, should he be apprehended, that he did not know, you may treat this deliberate avoidance of positive knowledge as the equivalent of knowledge.

Consequently, in contrast to the instant case, before the jury could convict in Joly it had to determine that the defendant believed that the package contained cocaine, yet sought to insulate himself from the conviction by failing to secure positive knowledge of that fact.

POINT II

IN HIS CHARGE THE JUDGE COMMITTED REVERSIBLE ERROR BY (1) INSTRUCTING THAT APPELLANT WAS AN INCREDIBLE WITNESS; AND (2) MARSHALLING THE EVIDENCE SO AS TO TELESCOPE TO THE JURY HIS BELIEF IN APPELLANT'S GUILT.

(1)

Appellant's testimony was critical to the defense. While conceding that she went, at Dantzler's request, with Bergin and Miller to the Cameo Theater, appellant explained that she believed that she was invited as a guest. Further, she maintained that she had no knowledge of Dantzler's intention to sell cocaine. Her testimony conflicted with Bergin's and Miller's* in that she asserted that she didn't overhear their conversation with Dantzler concerning the transaction, and further that she was neither questioned about nor did she vouch for Dantzler's reliability to do "straight business."

Although appellant was a competant witness [18 U.S.C. §3481] and had the right to testify, a right that the judge noted in his charge, his instruction to the jury

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* Not to mention Dantzler's.

on assessing appellant's credibility virtually destroyed that right. While general witness credibility was a subject superficially covered toward the end of the charge (13-14), standards for assessing appellant as a witness were presented earlier in the charge, in detail and in isolation from the other witnesses.

It was error to segregate the instruction on appellant's testimony from that of other witnesses because to do so improperly intimates that her testimony is of a different character. It necessarily suggests that different standards are to be used in evaluating her evidence (Taylor v. United States, 390 F.2d 278, 285 (8th Cir. 1968), while, on the contrary, a defendant who takes the stand is a witness like any other:

> A defendant who wishes to testify, however, is a competant witness, and the defendant's testimony is to be judged in the same way as that of any other witness.
>
> (Devitt and Blackmar, Federal Jury Practice and Instructions, §12.11)

The judge's suggestion by placement of the instruction that this is not so unfairly infringed on appellant's right to present a defense.

However, the error here was not merely spatial. The judge commented about appellant's "deep personal

interest in the outcome of the case," a charge which itself is the object of criticism [United States v. Hill, 470 F.2d 361, (D.C. Cir. 1972); Taylor v. United States, supra, 390 F.2d at 285; United States v. Mahler, 363 F.2d 673 (2d Cir. 1966)], and then went on to say:

> A defendant who would help in selling cocaine would probably lie to protect herself but she submitted to cross-examination, and a defendant who testifies may well be telling the truth.
>
> (10-11).

The effect of this instruction was necessarily to obliterate appellant's credibility and the chance that the jury would fairly consider her testimony in determining guilt or innocence. The jury was not directed to consider her demeanor, or whether there had been internal inconsistancies in her testimony. Rather because she was the defendant the criteria for evaluating her testimony was, according to this charge, a preliminary determination as to her guilt. This, after the judge had just instructed that appellant was in effect the only one who could defend against the charge of "knowing" participation in the sale.

Therefore, rather than encouraging a deductive reasoning process wherein the jurors would assess the evi-

dence including appellant's testimony and then conclude after weighing all of it, if guilt had been proved beyond a reasonable doubt, the judge shortcircuited the process and virtually, excluded appellant's testimony from proper consideration.

(2)

The defense was further sabotaged by the Court's treatment of the evidence pertaining to knowledge. After focusing on knowledge as the critical factor for the jury's determination, he explained how appellant's state of mind could be established by circumstantial evidence* and he marshalled the evidence as follows:

> . . . you can consider the peculiarity if you consider as such of going to a theater with a couple of strange men without the one who introduced you at 10:00 o'clock at night, in the middle of the second show and see whether this is a circumstance that implies knowledge that there was a cocaine transaction to take place in an area where Miss[sic] Docier Sr. said cocaine was all over the neighborhood, or whether it was just an adventurous girl who thought here was a chance to go out, she had an older friend and she would have an interesting time (9-10).

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* Of course, the only direct evidence as to knowledge was appellant's testimony and that was effectively descimated with the instruction on credibility.

The bias of this presentation is patently obvious. What the record fairly reflects but what was obscured by the charge is that this eighteen year old schoolgirl, visiting her friend's twenty-four year old sister was dazzled by the prospect of going to the movies with an older woman and two of her male friends.* That it was late and that she didn't know either man only added to the excitement and sense of adventure. Also, enticing and flattering was Mary Lou's decision to entrust these two men to appellant alone. In these circumstances, that the movie had already begun was truly an irrelevant consideration.

Nonetheless, despite evidential support for this analysis, it was precluded from the jury's consideration by the Court's jaundiced presentation of the facts. Such judicial intrusion upon the jury's function is reversible error.

While, of course, a federal judge is more than a mere moderator (United States v. Curcio, 279 F.2d 681 (2d Cir. 1960), his privilege of commenting on the evidence

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* This conclusion is further buttressed by the revelation in the record that appellant is very stout and therefore has probably had little dating experience(31).

is not unlimited; his commentary must not mislead, and it "especially" should not be one-sided. Quecia v. United States, 289 U.S. 466, 470 (1933). One-side recapitulation of the evidence violates the standard of impartiality required of a federal judge. United States v. Brandon, 479 F.2d 830, 834 (8th Cir. 1973); United States v. Dunmore, 446 F.2d 1214 (8th Cir. 1971); United States v. Porter, 386 F.2d 270 (6th Cir. 1967); United States v. Boatright, 105 F.2d 737, 734 (8th Cir. 19).

This Court has explicitly cautioned that a trial judge must not act as an advocate in advancing factual findings of his own. United States v. Tourine, 428 F.2d 865, 869 (2d Cir. 1970). While he can go so far as to express his opinion as to the evidence [but see United States v. Fernandez, 480 F.2d 726, 738 (2d Cir. 1973); United States v. Brandon, supra, 479 F.2d at 833] it must be clearly labeled as such. Further, it must be restricted by the caveat that the jury is not, in any way, bound by the judicial evaluation. Where, as here, judicial opinion is camouflaged as an objective marshalling of the evidence, its effect is more pernicious. Not identified as an evaluation that the jury is free to reject, it will insideously and without

limitation influence the jury's deliberations. In such a situation, mere boilerplate cautions as to the jury's ultimate authority to evaluate the evidence will not suffice to compensate for the error. United States v. Jacobo-Gil, 474 F.2d 1213, (9th Cir. 1973); United States v. Tourine, supra, 428 F.2d at 870.

Because resolution of this short and uncomplicated case depended on the jury's determination of whether appellant knew of the cocaine transaction, the judge's instruction which telescoped to them his belief that she did know and was therefore guilty, mandates reversal.

CONCLUSION

FOR THE AFORESAID REASONS, THE CONVICTION SHOULD BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL.

Respectfully submitted,

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February 14, 1975

CERTIFICATE OF SERVICE

February 14, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Sheila Gurstein